ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Rules and Policies	)	CS Docket No. 97-98
Governing Pole Attachments	)	
	)	

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

The comments submitted in this proceeding clearly demonstrate the continued need for Commission oversight of pole attachment rates, terms, and conditions. But some pole owners would have the Commission ignore their monopoly control over essential bottleneck inputs and immediately deregulate pole attachments. At the same time, they seek the ability to levy multiple charges for use of the same space, make unsubstantiated changes in the presumptions surrounding usable space and the amount of space used by an attachment, and overcharge conduit occupants or exclude them altogether. They also encourage the Commission to go far beyond the scope of this proceeding and abandon the historic cost methodology it has applied for nearly 20 years.

In Section I, AT&T discusses the ongoing ability and practices of pole and conduit owners to extract excessive rates from attachers. There are no viable alternatives to these existing structures and the emergence of competition for local telecommunications services only increases utilities' ability and incentive to engage in anticompetitive behavior. The danger of abuse is so obvious that even some pole owners have requested the protections afforded by the Pole Attachment Act.

As AT&T demonstrates in Section II, the Commission should resist electric utility attempts to extract multiple charges for use of the same unit of space. In a radical departure from past practice, these pole owners urge the Commission to allow a full additional charge for overlashed cables -- which use no additional pole space -- because they take up load capacity. In fact, the additional load impact of an overlashed cable is typically de minimis; rather, it is the electric utilities' much heavier power cables that have the largest load impact. And a few

commenters would exclude wireless attachments and transmission towers from the Commission's jurisdiction when they clearly fall within the statutory grant of authority.

Section III discusses the improper proposal by the electric utilities to supplant the current pole attachment rate methodology with a replacement cost approach. This proposal is clearly beyond the scope of this proceeding and, in any event, these commenters fail to demonstrate that a replacement cost standard is consistent with forward-looking economic principles or with the settled construction of the Pole Attachment Act.

In Section IV, AT&T shows that any negative book problems arising under the current rate formula would be best handled through the Commission's waiver process. Almost all commenters now reject the proposed removal of net salvage when the book value turns negative -- including the proposal's original advocates. Not only would this approach present many difficulties, it would overcompensate pole owners and raise unnecessary barriers to entry. The gross book method presents its own problems. While its supporters admit that rates would increase, they provide no more than minimal discussion on the overall impacts of a gross book approach. In light of the overcompensatory characteristics of the current formula, the anticompetitive potential of such a widespread change in the Commission's formula cannot be justified absent significantly greater evidence. This overcompensation, however, does necessitate a further adjustment in the pole attachment methodology, namely the proration of total company ADT to the poles account.

Section V confirms that there is no justification for changing the Commission's presumptions about pole height or usable space. Utilities admit that poles 30 feet tall or less continue to be installed as well as used by third party attachers. Pole owners also continue to use

safety space and -- as the Commission has long held -- this space exists because of the presence of electric utilities. Finally, the Commission's current presumptions more than adequately account for line sag and the NESC's ground clearance requirements.

AT&T supports the Commission's efforts to map Part 31 accounts to Part 32 accounts. But, as AT&T shows in Section VI, electric utility proposals to vastly expand the accounts included in the Commission's formula are overreaching, bear no relationship to the cost of bare poles or conduit, and would produce overrecovery.

Finally, in Section VII, AT&T demonstrates that the Commission should employ a "one-third duct" convention. Indeed, the evidence introduced by some commenters would support a "one-quarter duct" or higher approach. Moreover, electric utility claims that their conduit cannot be shared is countered by their own practices and the NESC. Hence, when other parties occupy their conduit, the electric utilities should be allowed only to assess a rate consistent with the "one-third duct" convention as well.

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Amendment of Rules and Policies Governing Pole Attachments	)	CS Docket No. 97-98

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Notice of Proposed Rulemaking,[1] AT&T Corp. ("AT&T") hereby submits its reply comments with respect to the designated issues concerning pole attachment rates.

INTRODUCTORY STATEMENT

In its initial comments, AT&T stressed the importance of Commission oversight of pole attachment rates and practices to efficient facilities-based telecommunications competition. The comments submitted in this proceeding only underscore the need for continued Commission intervention. Most telling are the claims made by pole and conduit owners themselves. Many of these commenters urge the Commission immediately to deregulate pole attachment rates and rely on market forces in the "spirit of competition" that underlies the Telecommunications Act of 1996 ("1996 Act"). The Telecommunication Act does seek to promote competition in local

[1] Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98, Notice of Proposed Rulemaking (released March 14, 1997) ("NPRM").

telecommunications markets for the first time, but it attempts to do so by breaking the stranglehold that local utilities have on bottleneck inputs like poles and conduit, not by allowing the owners of these essential facilities unilaterally to dictate the terms and conditions for access.

Pole and conduit owners also propose radical changes from the Commission's current attachment rate formula. For example, certain electric utilities advocate scrapping the formula altogether and substituting a new "replacement cost" formula. Even ignoring that these utilities propose mixing forward-looking and historic costs in order to capture the most inflationary features of each regime, their "replacement cost" proposals are beyond the scope of this proceeding and conflict with settled interpretations of the Pole Attachment Act. But the electric utilities go further, seeking to load a smorgasbord of additional Federal Energy Regulatory Commission ("FERC") expense accounts into the pole attachment formula. Many of these accounts bear no relation to pole or conduit costs, and including them would both produce massive overrecoveries and unnecessarily increase the complexity of a formula that both Congress and the Commission have properly sought to keep as straightforward as possible.

The electric utilities' proposed changes do not end with these broad measures. Electric utilities take the internally inconsistent position that the presumptive pole height should be increased, while the amount of usable space should be decreased, when the obvious and direct result of a pole height increase would be an increase in the amount of space available for attachments. They also seek (i) multiple charges for the same pole space, (ii) unwarranted and costly "safety" and "administrative" restrictions on pole attachments, (iii) unsupported changes in the presumptions relating to the physical characteristics of poles designed artificially to decrease

usable space, and (iv) conduit rates based on the false premise that they cannot be forced to share conduit.

And now some electric utilities are apparently taking the incredible stance that -- despite almost 20 years of unchallenged pole attachment regulation -- the Commission has no authority to prescribe pole attachment rates. See Order, Amendment of Rules and Policies Governing Pole Attachments, CS Docket No. 97-98 ¶ 3 (released July 25, 1996) (the electric utilities "contend that issues raised in the instant proceeding parallel issues decided in *Iowa Utility Board*"). Specifically, the electric utilities contend that Iowa Utils. Bd. v F.C.C., No. 96-3321, 1997 WL 403401 (8th Cir. July 18, 1997) has relevance here. It plainly does not. In Iowa Utils. Bd., the Eighth Circuit vacated certain of the Commission's interconnection, unbundling and resale pricing rules on the theory that § 252 of the 1996 Act places exclusive authority over such matters in the states. Whatever the merit of that construction of the 1996 Act, the electric utilities ignore that the Pole Attachment Act (47 U.S.C. § 224) grants the Commission express authority to "regulate the rates, terms, and conditions for pole attachments," § 224(b)(1) except "where such matters are regulated by a State." § 224(c)(1).

These anticompetitive tactics should remove any doubt that the Commission must remain vigilant in protecting attachers. As detailed below, the Commission can do so here by rejecting the utilities' baseless attempts to "overhaul" the Commission's interim rate formula and by clarifying that double-charging and other discriminatory and anticompetitive practices violate the Pole Attachment Act and the Commission's rules.

I. THE COMMENTS CONFIRM THAT POLE AND CONDUIT OWNERS CAN AND WILL BEHAVE ANTICOMPETITIVELY AND EXTRACT EXCESSIVE FEES FROM ATTACHERS ABSENT THE PROTECTIONS AFFORDED BY THE COMMISSION'S RULES.

As they have in virtually every proceeding since enactment of the Pole Attachment Act, the electric utilities urge the Commission to relax its regulatory oversight and let "market forces" determine attachment rates. But significant market forces simply do not exist for poles and conduit. Just as they did two decades ago when Congress passed the Pole Attachment Act, utilities still "control the essential corridors that cable operators and competitive telecommunications companies need to provide service." NCTA at 45.

Indeed, the comments in this proceeding confirm that pole (as well as conduit and other structure) monopolies are, if anything, stronger and more entrenched than at the time of the Pole Attachment Act of 1978. Even electric utilities agree, for example, that local government "safety and aesthetic" regulation that exacerbates the already formidable difficulties in installing new poles and conduit is on the rise. The Electric Utilities Coalition at 67 ("Electric Utilities I"). See also WorldCom at 4-5 ("[m]any local municipalities encourage, and often mandate, that other entities, such as new telecommunications service providers, utilize these existing poles, ducts, conduits, and other existing facilities").[2] And, notwithstanding half-hearted attempts by a few electric

[2] See also TCI at 4 ("attempts to construct or acquire new poles, conduit, ducts, and rights-of-way are impeded or prevented not only by economic barriers, but also by State and local government regulation") (citing Federal Preemption of Moratoria Regulation Imposed by State and Local Governments on Siting of Telecommunications Facilities, DA 96-2140, Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association (filed Dec. 16, 1996) (documenting over 110 state and local moratoria on telecommunications facility siting)). In addition, many local governments already impose exorbitant franchise fees and delay issuing permits in reasonable time frames.

utilities to fabricate "alternatives" to their poles, it is a simple fact that in most of the country there are no viable alternatives. In this regard, wireless "alternatives" do not today threaten pole monopolies, and even when economically feasible most wireless solutions will themselves require pole attachments -- as the electric utilities recognize in their attempts to evade regulation of wireless attachments, see, infra. Nor does direct burial or trenching of cable and conduit seriously threaten utilities' bottleneck control; in fact, an entrant seeking to bypass utility poles through burial currently faces many of the same economic, environmental, and legal hurdles that generally render replication of existing pole and conduit networks infeasible.

The electric utilities' economic arguments are equally meritless. First, they claim, increased competition in downstream markets for telecommunications and cable services will somehow constrain pole attachment rates to market levels. Of course, precisely the opposite is true. Competition among downstream service providers, all of whom are dependent on a monopolist to provide an essential input, provides no check on the price the monopolist charges for that input. Rather, increased downstream competition heightens the importance of obtaining the monopoly input as quickly as possible and may thereby increase the vulnerability of the downstream service providers to excessive rates. Further, where the input provider competes in the downstream service market, both the input provider's motivation to charge monopoly prices and the harm to competition and consumers caused by such anticompetitive conduct are increased. The Commission itself recently reiterated its concern over these "anti-competitive motive[s]" in striking down unreasonable restrictions imposed by an electric utility on a cable

company, both of whom are now directly or indirectly involved in the provision of telecommunications services. Marcus Cable ¶ 23.[3]

That utilities can and would abuse their monopoly power absent Commission oversight is only too clear. WorldCom, for example, pays "nearly twenty times" the rate for conduit paid by a local cable provider. WorldCom at 5. Aberdeen Cable, a small cable operator, apparently was bankrupted by twelve years of litigation challenging abuse by pole owners. See NCTA at 5. Such discrimination and anticompetitive conduct is widespread, see ALTS at 2 ("competitive carriers have found substantial intransigence by many utilities and blatant refusals to negotiate in a reasonable manner or in compliance with existing rules"),[4] and would certainly increase if, as some commenters suggest, the Commission were to relax its rules and rely solely on negotiated

[3] See also Marcus Cable; TCI at n.5 ("On several occasions, the Commission has characterized utility pole and conduit facilities as 'bottlenecks' or 'essential facilities'") (citing Teleport Communications - New York, File No. 13135-CF-TC-(3)-92, Memorandum Opinion and Order, 7 FCC Rcd 5986, 5987-88 at ¶ 16, and others); TCI at n.18 ("See 'Common Carrier Bureau Cautions Owners of Utility Poles,' DA 95-35, *Public Notice* (rel. Jan. 11, 1995) (observing that '[u]tility poles, ducts, and conduits are regarded as essential facilities' and, after noting allegations of utilities' anticompetitive acts, affirming the Bureau's 'commitment to ensuring that the growth and development of cable television is not hindered by unreasonable conduct on the part of utility pole owners'").

[4] See also ALTS at 3 ("there are a number of very significant nonrecurring charges that utilities recoup up-front from entities seeking pole or other attachments that are not included in the monthly fee. The largest of these tend to be fees for assessing the availability of space, make-ready fees and modification fees but some companies have attempted to extract additional excessive fees or to place conditions on the pole attachment agreements that result in large increases in the costs to attaching carriers"); NCTA at 44 (utilities "routinely include unjust and unreasonable provisions in their adhesive pole attachment boilerplate which they then demand be signed 'as is' without modification"); id. at 47 (noting Commission's recent consideration of a utility "pole attachment agreement which sought to deprive the attaching party of any remedy outside those of the agreement, and to force the attaching party to renounce the jurisdiction of this Commission or any other tribunal with jurisdiction over the rates, term and conditions of attachments").

rates. For that reason, even incumbent LECs -- typically pole and conduit owners themselves -- believe that they need the protections afforded by the Pole Attachment Act. See, e.g., GTE at 9 ("[t]he goal of the pole attachment formula has been, and continues to be, to prevent those with market power arising out of the ownership of pole infrastructure from using that power to hinder competition"); USTA at 11 (urging the Commission "to ensure that the rates utilities charge incumbent LECs to attach to poles [are] just and reasonable").[5]

II. THE COMMISSION SHOULD REJECT ANTICOMPETITIVE ELECTRIC UTILITY PROPOSALS TO DOUBLE CHARGE FOR POLE SPACE AND TO EVADE REGULATION ALTOGETHER WITH RESPECT TO WIRELESS AND TRANSMISSION TOWER ATTACHMENTS.

The Commission's current pole attachment formula and rules determine maximum charges for the use of vertical feet of pole space, and the Commission has consistently resisted utility efforts to double charge for the use of leased space or to discriminate based upon the types of attachments placed in that space or the types of services provided by the attaching parties. Nevertheless, the electric utilities ask the Commission to reverse course and approve each of those anticompetitive practices here. The Commission should again reject these utilities' improper attempts to exercise their monopoly power by: (1) charging twice (or more) for the use of single foot of pole space notwithstanding that a single charge recovers the relevant costs, and (2) evading altogether regulation of wireless attachment rates and rates for attachments to electrical "transmission" structures.

[5] See also TCI at 8; WorldCom at 3 ("the Commission must ensure that nascent local competition is not left vulnerable to onerous and discriminatory practices by [pole owners] for attaching to poles, occupying conduit, or using rights-of-way").

A. Double Charging Proposals.

As AT&T explained in its initial comments, the Commission's current pole attachment formula determines the "maximum just, reasonable, and nondiscriminatory terms and conditions for the use of pole space" (AT&T at 5). Usable space is the vertical "space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment" (47 U.S.C. § 224(d)(2)) and, accordingly, a pole owner is fully compensated -- if not overcompensated -- for the use of a vertical foot of pole space by the payment of a single attachment charge at the maximum permissible rate. For that reason, AT&T (at 7-8) urged the Commission to "clarify that pole owners may not prohibit or limit technically feasible multiple uses of pole space and may recover no more than one attachment charge for each vertical foot of pole space (and each inner duct in conduit)."

The comments confirm that this clarification is necessary. For example, the electric utilities propose attempting to extract an additional "full attachment rate" for overlashing. See American Electric Power Service Company, Commonwealth Edison Company, Duke Power Company, Florida Power and Light Company, Northern States Power Company ("Electric Utilities II") at 73. The electric utilities do not even attempt to demonstrate that overlashing somehow uses additional pole space. Nor do they deny that the Act and existing rate formula authorize charges for the use of space and space alone. Instead, in a radical departure from the ratemaking methodology that has been applied over two decades of pole attachment proceedings, these utilities claim that "the overlashing party takes up load capacity on the pole equal to or greater than a regular attachment." Id. To the contrary, overlashed cable, which is typically fiber optic cable, weighs much less than traditional copper cables or the power supply lines attached by

the electric utilities. Indeed, even under the worst case scenario, the typical pole configuration has sufficient load capacity to handle multiple overlashed cables, without compromising safety or operational procedures. In any event, if the electric utilities' load arguments were accepted -- indeed if they take their own position seriously -- then electric utility attachment of heavy electric cables to poles should bear a much greater share of the poles' total cost because they weigh much more than traditional communications cables. In short, the "load" argument is baseless, and the Commission should clarify that there can be only a single charge at the maximum permissible rate for a given foot of pole space.[6]

B. Wireless Attachments and Transmission Towers.

A number of electric utility commenters argue that the Commission does not have jurisdiction over wireless attachments and that the rates for such attachments should be determined by the private market.[7] Both arguments must be rejected. First, attachments by wireless entities are covered by the express language of section 224. Under Section 224(a)(4), a "pole attachment" is "any attachment by a. . .provider of telecommunications service." 47 U.S.C. § 224(a)(4) (emphasis added). Section 224(f) likewise requires a utility to provide "any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-

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[6] See also Electric Utilities II at 74-75 ("Parties seeking to overlash must obtain the pole owner's prior approval before any overlashing is performed. Parties seeking to overlash, and entities that are currently overlashing, must have a pole attachment agreement with the utility pole owner before overlashing occurs. Parties seeking to overlash must calculate not only the incremental effect of their attachment on the pole, but also the total effect of all attachments, in order to maintain and ensure pole integrity. Overlashing attachers must also be required to comply with all other applicable safety, reliability and engineering standards and specifications. Parties seeking to overlash must separately identify their facilities").

[7] See, e.g., PSCNM at 5.

way."[8] 47 U.S.C. § 224(f) (emphasis added). Commercial mobile services are telecommunications services, and providers of commercial mobile radio services are telecommunications carriers.[9]

Second, as the Commission itself has correctly noted, wireless carriers are fully entitled under the 1996 Act to access to utilities' poles at rates consistent with the rules adopted in this proceeding. NPRM ¶ 65. Indeed, Section 224(d)(3) explicitly states that the Federal formula for pole attachment rates applies to "any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service." § 224(d)(3) (emphasis added). If wireless attachments are not included within the scope of the Commission's rate rules, reliance on "marketplace" negotiations will produce exorbitant pole attachment rates. In New York, for example, which has some of the highest pole attachment rates in the country, utilities typically charge cable systems approximately $10 per year per pole for their attachments.[10] By contrast,

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[8] The Commission reiterated this view in the Local Competition Order, stating that "the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access." First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (released Aug. 8, 1996) ¶ 1156 ("Local Competition Order").

[9] See 47 U.S.C. § 153(46) ("telecommunications service" means "the offering of telecommunications for a fee directly to the public. . ., regardless of the facilities used") (emphasis added). A "telecommunications carrier" is "any provider of telecommunications services." § 153(44) (emphasis added). See also Local Competition Order ¶ 993 (CMRS providers are telecommunications carriers).

[10] See, e.g., Central Hudson Gas & Elec. Corp., Schedule P.S.C. No. 14 – Electricity, 19th Revised Leaf No. 22M (issued Apr. 14, 1997) (annual rate of $8.43 per equivalent pole); Consolidated Edison Co. of New York, Inc., Schedule P.S.C. No. 9 – Electricity, 3rd Revised Leaf No, 139 (issued Apr. 15, 1996) (annual rental rate of $13.79 per pole attachment).

utilities routinely charge wireless attachers $5,000 or more per year per pole. By including all pole attachments by telecommunications carriers under a uniform formula, the Commission will also minimize pole attachment rate discrimination, removing one competitive barrier currently faced by wireless carriers.

Finally, the Commission should reject the electric utilities' argument that the Commission lacks the authority to regulate attachments to "transmission towers."[11] The Communications Act establishes the right of telecommunications carriers to attach to any pole, duct, conduit, or right-of way owned or controlled by a utility. Transmission towers fall within these broad parameters.[12] Consistent with Congress's determination to extend pole attachment rights to telecommunications carriers, moreover, the Commission was correct to construe the terms "pole, duct, conduit, or right-of-way" to include all pathway facilities used by carriers for their attachments.

III. THE UTILITIES' BELATED ATTACKS ON THE HISTORIC COST BASIS OF THE INTERIM RATE FORMULA ARE BEYOND THE SCOPE OF THIS PROCEEDING AND OTHERWISE MERITLESS.

For nearly two decades, the Commission has consistently applied a historic cost approach to calculating pole attachment rates. That approach repeatedly has been re-validated by Congress,[13] upheld by the courts, including the Supreme Court, see FCC v. Florida Power Corp.,

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[11] See, e.g., PSCNM at 4.

[12] See Local Competition Order ¶ 1184.

[13] See NCTA at 7 (Commission's rate formula was "considered and re-validated by Congress in 1983, when it lifted the formula's five-year sunset provision contained in the original version of Section 224; in 1984, when it amended Section 224 as part of the sweeping Cable Communications Policy Act of 1984 but left the formula intact; in 1992, when it passed the Cable Competition and Consumer Protection Act; and in 1996, when it passed the Telecommunications Act of 1996 and retained the formula").

480 U.S. 245, 253 (1987), and is followed by many states which regulate pole attachments.[14] Certain electric utilities now claim that the Commission can and should simply ignore twenty years of consistent application of § 224 in favor of one or more "replacement cost" approaches -- which the electric utilities' proposed formulas demonstrate are in fact "hybrid" mixes of historic and replacement cost principles designed only to maximize rates.[15] But the electric utilities do not even attempt to demonstrate how their new approaches could be consistent with settled constructions of the Pole Attachment Act or even the economic principles upon which they purport to ground those proposals.

In any event, the Commission quite properly limited its Notice in this interim rate proceeding to proposed adjustments to its existing historic cost-based formula. The Commission did not address the possibility of abandoning its formula, and, indeed, did not contemplate any fundamental changes in the basic approach to determining pole attachment rates. Most commenters, including AT&T, therefore focused on the noticed issues involving, inter alia, application of the existing formula and proposed adjustments to the formula's treatment of pole height and negative salvage values. A number of electric utility pole owners, however, improperly seek to transform this proceeding into a one-sided referendum on "replacement cost" pricing that

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[14] See NCTA at 6-7 ("California is certified, but adopts the FCC's formula and usable space ratio. . .Ohio adopted the FCC formula intact after months of hearings. . .[T]he Michigan legislature adopted the FCC formula for all attachments on all poles owned by telecommunications competitors. . .[T]he Michigan PSC adopted the FCC formula for all electric utilities, whether or not they were currently diversified. . .New York adopted the FCC formula in 1997, explaining that using the FCC's rate and access standards would promote competition and assist telecommunications providers in deploying telecommunications facilities seamlessly across state lines").

[15] See, e.g., Electric Utilities II at 44.

by virtue of its late introduction would deprive commenters of a full opportunity to address the unique and complex legal, regulatory and economic characteristics of poles and conduit that should foreclose that approach here. But this interim rate proceeding is not the appropriate forum for that debate. Rather, if the Commission determines that the historic cost basis of its pole attachment formula warrants reconsideration, it should notice that issue in the proceeding for permanent rates to be conducted later this year and allow all commenters a full opportunity to investigate and comment on the legality and appropriateness of alternative approaches.[16]

IV. NEGATIVE BOOK VALUE ISSUES ARE PROPERLY HANDLED THROUGH THE COMMISSION'S EXISTING WAIVER PROCESS, AND NOT THROUGH ACROSS-THE-BOARD CHANGES THAT ARE UNNECESSARY AND WOULD PRODUCE WINDFALLS IN THE VAST MAJORITY OF CASES.

The comments confirm that the negative salvage issues raised by SBC in Oklahoma are not a widespread concern. BellSouth (at 6) and Sprint (at 7-8), for example, note that they have not encountered any negative rate problems, and BellSouth (at 6-7) "does not anticipate that, in the near future" it will do so. The electric utilities similarly state that they are not experiencing any negative net book problems; nor are they likely to encounter them.[17] Further, as Ameritech (at 2) points out, "pole plant investment might increase if, as a result of changes in the competitive

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[16] See 5 U.S.C. § 553(b)(3) (1988); see also United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 509, 549 (D.C. Cir. 1983) (the critical factor in determining whether or not there was sufficient notice is whether or nor a party "should have anticipated that such a requirement might be imposed").

[17] Electric Utilities II at 71 ("The Electric Utilities are not generally facing negative net investment problems"); Electric Utilities I at 58 ("Treatment of negative cost per bare pole due to cost of removal for pole investment exceeding salvage value for poles or the accumulated depreciation balances exceeding the gross pole investment is not a significant problem for the Electric Utilities").

landscape spurred by the 1996 Act, facility based competitors create demands for pole attachments necessitating pole replacements," thereby allowing pole owners to "avoid" the negative rate problem "altogether." And, in identifying the scope of the "negative rate" problem, most companies claiming that they are experiencing such difficulties concede that even in jurisdictions where they have a negative book value, attachment rates remain positive.[18]

In addition, the Commission should not lose sight of the fact that, whatever its frequency, the mere existence of a negative net book value does not alone support an underrecovery claim. Rather, a negative net book value may reflect the significant overrecovery that has occurred to date in anticipation of future expenditures on pole removal -- overrecovery that is exacerbated by the time value of the money the pole owner has recovered in advance.[19] In such circumstances, so long as the rates collected by the pole owner do not fall below the statutory minimum of incremental cost, there is no "problem" to be corrected.[20]

Even where some correction is warranted, as in the apparently rare situation of actual negative rates, the Commission's existing rules and practice are more than adequate, as AT&T (at 14-15) demonstrated in its opening comments. By contrast, both of the across-the-board proposals identified in the Notice to revise the formula itself -- i.e., removing net salvage when book value becomes negative or switching entirely to a "gross book" approach -- would cause far

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[18] See, e.g., SWBT at 3. Indeed, no commenter claims that it has a negative maximum rate.

[19] In light of this overcompensation, pole owner claims that they are "subsidizing" attachers (e.g., Electric Utilities I at 7) are entirely without merit.

[20] See, e.g., AT&T at 12; ALTS at 6 ("The 'problem' that SWB has identified cannot occur because even if the maximum rate formula occasionally would result in a negative rate under the Commission's formula, the statute contemplates a minimum rate that covers additional costs incurred by the utility").

more problems than they would solve and would produce overrecovery and overcharges in the vast majority of cases.[21]

The first proposal -- removing net salvage from the formula whenever book value would otherwise be negative -- is so flawed that even its original proponents have now abandoned it. See SBC at 6. In particular, removing net salvage at this late stage has hopelessly complex implications for return, taxes and other components of the rate formula, and, as incumbent LECs themselves recognize, to carry out the net salvage adjustment alone "it might be necessary to restate as much as 40 years of depreciation reserve activity." GTE at 7; USTA at 9. Moreover, this approach would result in even greater overcompensation of pole owners. AT&T at 14-15.

The gross book approach now favored by SBC and others is equally defective. The proponents of this reconfiguration, including SWBT (at 6), claim that the gross book approach provides a superior solution to the Commission's proposed removal of net salvage. The real motivation for their desire to abandon the net book method, however, is transparent. Whereas the Commission's solution would substantially raise rates in negative book value situations -- and, as

[21] The negative book problem that some pole owners may encounter is not unique to the telecommunications industry. In fact, the Financial Accounting Standards Board ("FASB") has recently issued a proposed statement of accounting standards that, at least in part, address this problem. See FASB Proposed Statement of Financial Accounting Standards No. 158-B, Accounting for Certain Liabilities Related to Closure or Removal of Long-Lived Assets (February 7, 1996). While these standards are not final, they would treat removal as an expense at the time it is incurred rather than as a charge to accumulated depreciation. This approach avoids the negative book problem inherent in the current formula. Rather than adopt the overcompensatory net salvage removal or gross book methodologies, the Commission should continue applying its net book approach until a range of alternative solutions such as that proposed by FASB have received further consideration.

AT&T (at 14-15) has shown, much more than necessary -- the gross book approach would significantly raise rates for all attachers immediately.[22]

More specifically, in contrast to the net book approach, a gross book calculation generates lower rates in early years and higher rates in later years.[23] But pole owners want the best of both worlds. They have already collected overcompensatory rates under the current formula -- rates the Commission recognizes should be balanced by subsequently lower rates (NPRM ¶ 25) -- and now they wish to convert midstream to a methodology designed to produce substantially higher rates at an older average pole life. The pole owners' proposal to change the accounting method midstream would almost certainly allow them to overrecover. Under the accelerated depreciation schedule inherent in the net book approach, pole owners begin recovering immediately for the cost of replacing their poles.[24] In the meantime, they earn additional money on these replacement

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[22] One of the principal problems with even considering the proposal that the Commission adopt the gross book approach is that its proponents have provided virtually no evidence on the impacts of this different methodology. While they admit that rates will increase, they do not quantify the extent to which rates will rise today and in the future. They have provided no information on the level of contributions that have been made toward pole removal by attachers and by the pole owners themselves. And, possibly most important of all, they have not explained how pole removal costs will be treated under the gross book approach. Without more data and a much clearer picture of how the gross book approach would actually work in practice, the Commission cannot reasonably conclude that this method is a sound approach. If the Commission seriously wishes to consider this method, then it should demand empirical studies from its proponents in a future rulemaking.

[23] See, e.g., Sprint at 9.

[24] The Commission should also take into account that pole owners are assuming as much as 40 years in advance that replacement costs will be very high. Given the compounded earnings pole owners will earn on replacement contributions from attachers literally for decades ... and the distinct possibility that the replacement cost estimates may be too high, pole owners may be vastly overcompensated even without a change in accounting methods or other over-compensatory features of the Commission's current formula.

cost contributions. The gross book approach, on the other hand, collects contribution for replacement expenses as they are incurred. Hence, for every pole currently in the Commission's formula, pole owners have already begun collecting fees and interest toward their replacement. In many instances, much or even all of an attacher's proportionate share of the replacement cost has already been collected. Now attachers will have to incur this expense again if the Commission suddenly abandons its net book approach.

Supporters of the gross book method would have the Commission ignore the overrecovery that has already occurred under the present methodology and switch to a different approach that will provide even more. AT&T at 16. Thus, AT&T joins commenters like U S WEST (at 2) and Time Warner (at 24) in urging the Commission "to employ the use of net book costs in calculating pole attachment rates." U S WEST at 2.[25]

Closely related to net book costs are accumulated deferred taxes ("ADT"). ADTs are necessary to account for the timing differences associated with the recording of income and expense items for "book" and tax purposes. In "rate base rate-of-return" proceedings the ADT balances are either deducted from rate base or treated as zero cost capital to recognize the fact that the utility has collected cash from its customers for taxes in advance of actual tax payments. Both treatments reduce the resulting service rates to recognize "up-front" payments. The inclusion of the estimated future cost of removal in the poles depreciation rate produces a book depreciation rate which recovers the original cost of poles far in advance of their actual

[25] If, however, the Commission does decide to make this change, AT&T would urge the Commission to phase in the resultant rate increases over a five-year period as Section 224(e)(4) will do for other inflationary modifications to the current formula. 47 U.S.C. § 224(e)(4).

retirement. In recognition of this significant early recovery, the Commission has insisted that the return component in the pole attachment formula be based on net book.

The inclusion of the estimated future cost of removal in the poles depreciation rate, however, has the reverse effect on ADT. Cost of removal must be expensed as incurred for tax purposes, i.e., it is not included in tax depreciation rates. Hence, book depreciation rates for poles are higher than tax depreciation rates. Furthermore, due to the Commission's procedures for estimating the future removal costs, the amount included in book depreciation rates almost always exceeds the actual cost of removal incurred on an annual basis. Consequently, the ADT associated with poles is, at a minimum, much less than the ADT associated with other plant. Indeed, SBC claims that its pole-specific ADTs are actually negative. In the case of a negative ADT, pole attachment rates would actually increase artificially due to the effect of up-front payments for the cost of removal.

The Commission's proration of total company ADT to the poles account, then, would mitigate the inflationary effect the inclusion of future removal costs produce under a solely pole-specific ADT calculation, as well as recognize that utilities use accelerated tax depreciation rates for poles that are the same as for other accounts.

V. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD REJECT THE ELECTRIC UTILITIES' PROPOSED REVISIONS TO THE RATE FORMULA'S TREATMENT OF POLE HEIGHT, SAFETY SPACE AND OTHER COMPONENTS OF USABLE SPACE.

Commenters universally agree that to be workable and to provide a level of certainty sufficient to encourage negotiated solutions the interim rate formula must continue to rely upon averages and rebuttable presumptions regarding the physical characteristics of poles. Most commenters support the Commission's existing presumptions, which reflect many years of

experience and whose continuing validity has been tested and confirmed in countless litigated proceedings. Certain electric utilities, however, predictably seek to revisit the same baseless usable space claims the Commission has previously rejected. But these utilities provide no support for their proposed changes to the formula's presumptions.

A. Pole Height. The comments overwhelmingly confirm that the Commission should reject the electric utility Whitepaper sponsors' unsupported proposal to increase the rate formula's presumptive pole height from 37.5 feet to 40 feet. Pole owners and attachers alike agree that the Whitepaper sponsors "have not presented any specific information to substantiate an increased average pole height." SWBT at 34.[26] Even other electric utilities recognize that "[t]he Whitepaper sponsors have made no showing that the use of 45 foot poles has increased nationwide." ConEd at 14.[27] Further, the "the spatial needs of individual cable operators and LECs have remained constant or even decreased slightly," and "demand for taller poles[,]" if any, thus stems "solely from the increased spatial needs of the electric utilities." USTA at 25. See also NCTA at 10. Accordingly, although individual companies remain free to make a showing of greater than average height, "[t]here is simply no record or other basis for altering the current Commission presumptions regarding pole height." GTE at 12.

B. Thirty Foot Poles. The record similarly forecloses electric utility proposals to exclude poles measuring 30 feet or less (or to apply a separate formula to these shorter poles) on

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[26] See, e.g., Bell Atlantic/NYNEX at 10-11; U S WEST at 3-4; Time Warner at 9; Ameritech at 3 ("A change in the presumption regarding average pole height from 37.5' to 40' is not warranted"); Sprint at 3 ("an increase in the presumptive pole height is. . .unwarranted"); GTE at 12.

[27] See also Edison Electric at 26 ("it is not necessary to alter the average height of poles").